

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

APPEAL NO.NO.1094 OF 1997
IN
WRIT PETITION NO.3131 OF 1991

M/s. Sylvester & Co.
Sylvester Building,
20, S. Bhagat Singh Road,
Opp.. Old Custom house,
Fort, Bombay-400 023.

...Appellant.

Versus

1.Their Workman through
Transport & Dock Workers' Union,
Bombay, P.D'Mello Bhavan,
P. D'Mello Road, Carnac Bunder,
Bombay-30.

2. P. D. Apshankar,
Presenting Officer, Central
Government Industrial Tribunal
No.2, Bombay.

...Respondents.

.....

Mr.J. P. Cama, Senior Advocate i/b. M/s. Sanjay Udeshi & Co. for
the Appellant.

Mr. S. M. Dharap for Respondent No.1.

.....

**CORAM : R.M. S. KHANDEPARKAR &
DR. D.Y. CHANDRACHUD, JJ.**

June 13, 2007.

JUDGMENT (PER DR.D. Y. CHANDRACHUD, J.):

On a reference to adjudication under Section 10 of the Industrial Disputes Act, 1947 made by the Central Government on 15th October 1987, the Industrial Tribunal held: (i) By an award, Part-I, dated 1st September 1989, that the Central Government was the appropriate Government within the meaning of Section 2(a) and the Tribunal had jurisdiction; (ii) By an award, Part-II, dated 1st February 1991, that the termination of the services of the workman without holding a disciplinary enquiry was invalid and the workman was entitled to reinstatement with full back wages and continuity of service from 1st July 1986. The management challenged the awards in proceedings under Article 226 of the Constitution. The Learned Single Judge of this Court, by an order dated 3rd March 1997, affirmed the award. The judgment of the Learned Single Judge has been impugned in the present proceedings in appeal.

2. The Appellant carries on business of a Clearing and Forwarding agent. The workman was engaged as a Docks Clerk on 1st October 1978. On 27th June 1986, the management terminated the services of the workman on the ground of a loss of confidence. The subject of the letter was as follows:

“Loss of confidence due to persistent and deliberate lapses in duties inefficiency, habitual and frequent absenteeism, misappropriation of Company's money, misrepresentation of facts & false claim of overtime etc.”

The letter of termination records that since his appointment, the workman had committed “major lapses/omissions and dereliction in duties” which were then indicated as follows:

“1) Withholding 9 Way Bills pertaining to Voltas Limited for over a week, instead of handing these over to the office on the very day, thereby making the company liable for demurrage – Company's warning dated 27.12.78.

2) Frequent absentism without prior intimation/permission and availing excess leave when not due. Memoranda dated 13.6.79, 30th October 1981, 24th April 1982 & 8th May 1982.

3) Cheating company in collaboration with Mukadam (showing engagement of extra labour) warning dated 30-11-78.

4) Delay in payment of wharfage and effecting delivery - Memo dated 18.3.80.

5) Dereliction in duties & disobeying office instructions – Memoranda dated 7th April 1980, 3rd May 1980 & 7th May 1980.

6) Inefficiency – Memo dated 2nd Sept. 1980.

7) Defrauding Company by claiming excess delivery charges – Memo dated 26th November 1980.

8) Gross dereliction in duties & flouting

instructions and replying show cause notice for over 2 months – Memo dated 29th April 1981.

9) Not submitting the accounts of incidental expenses incurred in time as required – Memo dated 22nd April 1982.

10) Misbehaviour with Foreman of Stevedores and giving misleading information to office – Memo dt. 11.8.82.

11) Incurring unnecessary expenditure without permission sanction -Memo dated 20th December 1982.

12) Telling lies and violating office instructions – Memo dated 5th February 1983.

13) Reporting for duty habitually late in spite of warnings – Memo dated 5th February 1983.”

The letter records that in spite of repeated advice and warnings, the workman had continued to indulge in several “lapses, omissions and commissions” which where spelt out thus:

“i) Failing to register the containers at Manganese Ore Depot, in spite of specific instructions given to you and thereby incurring demurrage – Memo dated 19th September 1984.

ii) Despatching wrongly the sample fibres to various transporters without keeping office copies of the challans. Memo dated 17th July 1985.

iii) Fraudulent claim of overtime - Memo dated 13th August 1985.

iv) Negligence in tracing container No.TRIU

2800696-your explanation dated 3.4.86 for failing to trace the container is grossly unsatisfactory. Because of your deliberate negligence in tracing the container, the company is liable to steamer agents charges of Rs.4500/- together with container detention charges. This should have been recovered from you but lenient view was taken and you were warned vide memo dated 10/4/86.

v) Post dated leave application for 8 days leave. You have applied vide your application dated 24.5.86 for 8 days leave for the period 23.5.86 to 30.5.86. Although your said leave application is dated 24.5.86, it was received in this office on the morning of 23.5.86 by hand delivery. You resumed duty on 31.5.86 and have produced medical cum fitness certificate dt. 31.5.86. On carefully scrutinising the medical-cum-fitness certificate dated 31.5.86, issued by Dr. S.M. Nivdunge of Chembur, it is clear that your suddenly remaining absent from 23.5.86 without any prior intimation and then submission of post dated leave application (dated 24.5.86) on 23.5.86 itself, and then production of medical cum fitness certificate, the contents of which are prima facie doubtful, gives an impression that you have made up the entire story in support of your unjustified and sudden absence. Because of your frequent, sudden and habitual absence and Company has been put to serious inconvenience and consequent loss in business. Your explanation in this regard is also found most unsatisfactory.

vi) A sum of Rs.500/- was given to you on 20.5.86 for grounding of containers but it is very surprising to find that you have neither submitted your account as to how you have spent this money nor have you returned the balance to office till date."

The management stated that it had lost confidence and was accordingly dispensing with the services of the workman, in the following terms:

“Because of your aforesaid persistent lapses, unauthorised, habitual absence, dereliction in duties, misappropriation of company's money, habitual and deliberate late attendance etc., the company has lost confidence in you and has reluctantly been compelled to dispense your services with discharge simpliciter wef 1st July 1986.”

3. The Transport and Dock Workers' Union raised an industrial dispute before the Assistant Labour Commissioner (Central) and upon a failure of conciliation, the Central Government made a reference to adjudication on 15th October 1987. In paragraph 7 of the Written Statement, the employer pleaded that the Tribunal had no jurisdiction to entertain the dispute as the appropriate Government was not the Central Government. The Tribunal tried the issue of jurisdiction as a preliminary issue and by its award dated 1st September 1989 came to the conclusion that the appropriate Government was the Central Government. Consequently, the Tribunal held that the reference was validly made. Evidence was adduced before the Tribunal. By an award dated 1st February 1991, the Tribunal held that the discharge of the

service of the workman amounted to retrenchment within the meaning of Section 2(oo) and was invalid for want of compliance with the provisions of Section 25F. Consequently, the Tribunal was of the view that even if the management was correct in its submission that the termination was not by way of punishment, but a discharge simpliciter, the act of termination was invalid for want of compliance of the provisions of Section 25F. The Tribunal also noted that the contention of the workman was that his termination from service was by way of punishment and was not an act of discharge simpliciter. The Tribunal ruled that in case it was held that the dismissal was by way of punishment, the act of termination was invalid because no disciplinary enquiry was held and the charge of misconduct was not proved. On either view of the matter, the Tribunal came to the conclusion that the act of termination was illegal and the workman was entitled to reinstatement with continuity of service and full back wages.

4. The management having challenged the awards of the Industrial Tribunal, the Learned Single Judge of this Court in a judgment dated 3rd March 1997, came to the conclusion that the awards of the Tribunal, both on the question of jurisdiction and on

merits, could not be faulted. On the question of jurisdiction, the contention of the management was that no relationship of employment existed between the workman and the major port – the Bombay Port Trust – and that consequently the appropriate Government could not be the Central Government. The Learned Single Judge held that it was not in dispute that the workman was engaged as a Docks Clerk and that the management was carrying on business of clearing and forwarding and of import and export. The workman had stepped into the witness box and the Tribunal had noted that the evidence of the workman was not seriously challenged. The management had not discharged the burden to lead appropriate evidence regarding the business and the nature of the work that was required to be carried on as a Dock worker. The evidence showed that the workman was required to go to the Docks and his work and duties had connection with the work of clearing and forwarding. The finding of the Tribunal was held to be based on evidence. On merits, the Learned Single Judge, while confirming the Part-II award, noted that the letter of termination dealt, in the first part, with 13 items alleging major lapses on the part of the workman during 1978 to 1983, while the second part dealt with alleged lapses and omissions including misbehaviour

and cheating during the period 1984 to 1986. The Learned Single Judge held that there was no evidence on record to show as to why a domestic enquiry was not held when serious charges of misconduct were levelled against the workman and the workman was justified in his grievance that the order of termination had been passed without following due process of law. The judgment of the Learned Single Judge contained a detailed appreciation of evidence. Before the Learned Single Judge, the management had, relying on judgments of the Supreme Court, submitted that an opportunity ought to have been granted by the Tribunal to substantiate the alleged misconduct by leading evidence. The Learned Single Judge held that the Tribunal had furnished an opportunity to the management to lead evidence to prove a justification for terminating the services of the workman by a simple discharge. Moreover, the Learned Single Judge was of the view that the management had sought permission of the Labour Court only to prove that it acted bona fide and that it had not applied before the Labour Court to lead evidence to prove the charges. On the aforesaid reasoning, the plea of the management was not accepted and the awards of the Industrial Tribunal were confirmed.

5. In assailing the judgment of the Learned Single Judge, Counsel appearing on behalf of the employer has urged the following grounds of challenge: (i) The appropriate Government within the meaning of Section 2(a) of the Industrial Disputes Act, 1947 is not the Central Government but the State Government and, therefore, the reference to adjudication by the Central Government was not competent; (ii) In a termination for loss of confidence, individual cases of misconduct need not be proved and the material on the basis of which confidence has been lost has to be placed on the record; (iii) If the termination in the present case is held to be a termination on the ground of misconduct an opportunity ought to have been given by the Industrial Tribunal to the employer to substantiate the charge of misconduct by leading evidence and this opportunity was denied despite a specific plea in that regard made in the Written Statement; (iv) The judgment of the Learned Single Judge contained a detailed reappreciation of the evidence, an exercise which ought not to have been carried out in the jurisdiction under Article 226 of the Constitution and an order of remand would be warranted. On the other hand, on behalf of the workman, it has been submitted that; (i) The evidence on record would show that there was a reasonable and proximate

nexus between the nature of the business of the employer and a major port and the appropriate Government in the present case would be the Central Government since this was an industrial dispute concerning a major port; (ii) The employer in the present case gave up his right to justify the termination by not holding a disciplinary enquiry though the allegations in the letter of termination individually amounted to acts of misconduct; (iii) The Standing Orders provide for the holding of an enquiry and the employer must establish that it was impossible to hold a disciplinary enquiry; loss of confidence is not a rule but an exception and a case to that effect must be made out on the basis of exceptional circumstances.

6. These submissions can now be considered:

Appropriate Government :

7. Section 2(a) of the Industrial Disputes Act, 1947 defines the expression “appropriate Government”. In relation to those industrial disputes which fall within the purview of sub-clause (i), the Central Government is the appropriate Government, while in relation to all other industrial disputes, sub-clause (ii) provides that the State Government would be the appropriate Government.

Sub-clause (i) of clause (a) can, for convenience of exposition, be divided into several parts. The first part deals with an industrial dispute concerning any industry carried on by or under the authority of the Central Government or by a Railway Company. The second part deals with an industrial dispute concerning any such controlled industry as may be specified in this behalf by the Central Government. The third part deals with industrial disputes concerning various other establishments which are specifically enunciated. For the purposes of the present case, the dispute between the Appellant and the Respondent before this Court is confined to the following words of Section 2(a)(i), namely, “(a) appropriate Government means – (i) ... in relation to an industrial dispute concerning ... a major port, the Central Government ...” The expression “major port” is defined in clause (1a) of Section 2 to mean a major port as defined in clause 8 of Section 3 of the Indian Ports Act, 1908. The expression “major port” is defined by the Indian Ports Act, 1908 to mean any port which the Central Government may by notification in the Official Gazette declare or may under any law for the time being in force have declared to be a major port.

8. The provisions of Section 2(a)(i) came up for interpretation before the Supreme Court in **Serajuddin and Co. vs. Their Workmen**.¹ In that case, the State of West Bengal referred a dispute to adjudication and a preliminary objection to the validity of the reference was raised on the ground that it was not the State Government but the Central Government which was the appropriate Government. The Tribunal overruled the objection against which a Special Leave Petition was filed before the Supreme Court. The Appellant carried on mining operations in the State of Orissa and the function of its office at Calcutta was to exercise general control over the mining operations and look after the sale of mineral products of the mine. The argument of the employer was that the Head Office of the Appellant at Calcutta was an integral part of the mine and any industrial dispute between the office and its employees was an industrial dispute concerning the mine under Section 2(a)(i) in which case the appropriate Government was not the State Government but the Central Government. The relevant words of Section 2(a)(i) which fell for interpretation were an 'industrial dispute concerning a mine'. The argument before the Supreme Court was that the expression

¹ 1962(3) SCR 934

“industry” in Section 2(j) was wide enough to include the Head Office of a Mining Company though it may be situated away from the place where the mining operations are actually carried out and it is in the light of the definition of the word “industry” contained in Section 2(j) that the words “in relation to a mine” must be construed. The Supreme Court while rejecting the submission noted that where in Section 2(a)(i) it was intended to refer to an industry as such, the definition used the word “industry” as for instance where a reference is made to an industrial dispute concerning a controlled industry as specified by the Central Government. On the other hand, while referring an industrial dispute in regard to a mine, the definition did not refer to an industrial dispute concerning mining industry, but merely referred to an industrial dispute concerning a mine. The definition of the expression “mine” not having been made by the Act, the Court held that recourse would have to be taken to the dictionary meaning and to the definition in the Mines Act of 1952. The Supreme Court held that Section 2(j) of the Mines Act, 1952 defined a mine as an excavation wherein operation for the purposes of searching for or obtaining mineral ore is being carried on. The definition in Section 2(j) excluded an office of a mine which was separately defined by

Section 2(k). Hence, the Supreme Court was of the view that the head office wherever it may be situated cannot be said to do mining operations within the meaning of the definition. Hence, a dispute between the employees engaged at the Head Office at Calcutta and the employer was not an industrial dispute concerning a mine.

9. The judgment of the Supreme Court in **Serajuddin** (supra) has been followed by the Supreme Court in **Damodar Mangalji & Co. vs. Regional Director**.² In that case, the appellant challenged a notification issued by the Government of Goa, Daman and Diu under the ESI Act, 1948 contending that the notification in its application to mining industry was beyond the scope of the Act for the reason that the appropriate Government in respect of a mine was the Central Government and not the State Government. The Supreme Court while rejecting the submission of the employer held as follows :

“In **Serajuddin & Co.** case the dispute relating to the head office of a mining company was referred to the Industrial Tribunal by the West Bengal Government under the Industrial Disputes Act, 1947. It was held that the West Bengal Government was the appropriate Government and the decision turned on the

² (2001) 3 SCC 321

interpretation of Section 2(a)(i) of the ID Act which defines “the appropriate Government”. The crucial words that fell for interpretation were “in relation to an industrial dispute concerning a banking or insurance company or mine or an oilfield or a major port”. It was held that the word “mine” as used in Section 2(a)(i) of the ID Act referred to a mine as defined in the Mines Act and that a dispute with reference to the head office of the mine was not a dispute concerning a mine which must mean mine as defined under the Mines Act. Therefore, this Court, having interpreted the expression “the appropriate Government” in the Industrial Disputes Act in *Serajuddin & Co.* case which is identical with the expression “the appropriate Government” as defined under the Act, we think the view taken by the High Court is correct and calls for no interference.”

10. The ambit of the expression “in relation to an industrial dispute concerning a major port” has fallen for consideration in several decided cases. Before dealing with those cases, it would merit emphasis that the relevant words used by the statute are that the industrial dispute should concern a major port. The expression “concerning a major port” emphasises the existence of a nexus between the industrial dispute and the major port. What is of concern to a major port has to be defined with reference to the ambit of the operation of the major port. If the nature of the dispute is such as to bear a reasonable and rational relationship to a major port, the element of nexus would be found to be present.

11. In **Tulsidas Khimji vs. Jeejeebhoy**,³ an industrial dispute was raised following the termination of the employment of certain workmen from the Clearing and Forwarding Department and Godown Department of a partnership firm. The firm carried on business as (1) clearing and shipping agents, (2) insurance agents, (3) godown keepers and (4) cotton supervisors and controllers. The reference which was made by the Central Government was sought to be impugned on the ground that the appropriate Government was not the Central Government. The judgment of the Division Bench of this Court noted that the contention urged before the Court was not taken before the Tribunal and could not be allowed to be entertained in writ proceedings, as a result. Moreover, the management had served a notice of the proposed retrenchment on the Central Government thereby accepting the position that the Central Government was the appropriate Government. Having regard to the peculiar circumstances, therefore, as they obtained in that case, the judgment in **Tulsidas Khimji**'s case proceeded largely on the premise that the challenge to jurisdiction was not raised before the Tribunal and the

3 1961 I LLJ 41

management had in fact accepted that the appropriate Government was the Central Government. The Division Bench, however, did observe that in so far as the activities of the Godown Department were concerned, it was admitted that 25% of the space in the godown was utilised for storing goods for clearing and shipping. In view of all these circumstances, the Court held that it could not be said that the activity of the godown department had no relation to a major port. The Division Bench consequently concluded thus:

“Since the dispute raised is with regard to the retrenchment in the clearing and forwarding department and the godown department, the activities of which, as we have seen, can be said to be concerning a major port, it would come within the scope of S.2(a). The Central Government, therefore, had authority to make the reference and the Central Government Industrial Tribunal had jurisdiction to deal with it.”

12. The Andhra Pradesh High Court had occasion to consider the ambit of the expression “concerning a major port” in **Continental Construction (P) Ltd. Visakapatnam v. The Government of India**.⁴ The appellant had entered into a contract with the Vashakhapatnam Port Trust for the construction of Break-Waters and Jetties, in connection with the construction of the outer harbour at Vishakhapatnam. A dispute having arisen between the

4 1977 Lab I.C. 1199

employer and its workmen, it was referred for adjudication by the Central Government. Mr. Justice O. Chinnappa Reddy (as the Learned Judge then was), rejected a Writ Petition filed by the employer challenging the maintainability of the reference on the ground that the Central Government could not have made the reference. Mr. Justice Jeevan Reddy (as the Learned Judge then was) speaking for the Division Bench in appeal, took note of the width of the expression “concerning” which is defined in the Webster's Third New International Dictionary as “relating to, regarding, respecting, about”. The Court noted that the expression “concerning” is a word of wide amplitude and, prima facie, any industrial dispute affecting or connected with a major port would fall within the said definition. That was the submission of the Central Government. The Division Bench held thus:

“We are, however, of the opinion that the word 'concerning' must be construed in a reasonable manner, and referring to such industrial disputes which have got a proximate, intimate and real connection with the Corporations or authorities mentioned in the said definition, and not a connection which is far fetched, remote and hypothetical.”

On facts, the Division Bench held that the industrial dispute between the Appellant and its workmen was closely connected with

the major port. The Appellant was engaged in the construction of Break-waters and Jetties in connection with the outer harbour, at the Vishakhapatnam port and any dispute between the Appellant and its workmen was likely to affect the progress of the said work and would directly affect the Port. Mr. Justice Jeevan Reddy noted that the second part of the definition in Section 2(a)(i) did not stipulate that the industrial dispute must concern the business of a major port. So long as there was an industrial dispute concerning a major port, and not necessarily the business of such major port, the second part of the definition is satisfied.

13. In a judgment of Mr. Justice Chittatosh Mookerjee (as the Learned Chief Justice then was) in **Radha Shyam Bagaria vs. Union of India**,⁵ the Calcutta High Court had occasion to consider a similar issue and the question as to whether the industrial dispute was one concerning a major port. While advertent to the judgment of the Supreme Court in the case of **Serajuddin** (supra), the Calcutta High Court noted that the Industrial Disputes Act, 1947 did not define the ambit of the expression “mine” as a result of which, the Supreme Court held that a reference would have to be made to

5 1980 I LLJ 249

the content of that expression in the Mines Act, 1952. On the other hand, the expression “major port” was defined by the Industrial Disputes Act, 1947 to have the same meaning as in Section 3 of the Indian Ports Act, 1908. Mr. Justice Chittatosh Mookerjee held thus:

“The intention of the Legislature appears to make the Central Government the appropriate Government in relation to industrial disputes concerning works in major ports. In the absence of elaboration in the Industrial Disputes Act, the Central Government would be an appropriate Government to make a reference under S.10 of the Act when the dispute is between the Management and the workers employed in works considered as incidental to or connected with operations in a major port. The Court is bound to examine the facts of each particular industrial dispute and determine the question whether in relation to the same the Central Government or the State Government would be the appropriate Government. Therefore, to put in another way in order to determine whether a particular dispute is concerning a major port, the real test would be the nature of the works or activity of the industry concerned employing the workmen in question.”

In so far as this Court is concerned, there are two judgments of Learned Single Judges which define the ambit of the expression “concerning a major port”. In **Transport and Dock Workers' Union vs. Khemka Co. (Agencies) Pvt. Ltd.**,⁶ Mr. Justice A.P. Shah dealt with a case where the employer was carrying on the business of a

6 1999 I CLR 678

shipping agency for several years and the entire business of the Company was concerned solely and exclusively with this business in the Port of Bombay. A settlement was entered into between the management and the workmen before the Assistant Labour Commissioner (Central). The Central Government was held to be the appropriate Government under Section 2(a). A similar view was taken in a judgment of the Learned Single Judge in **Oyster Marine Inc. v. Chandrakant R. Ugale**.⁷ While interpreting the word “concerning” in the context of Section 2(a), a Learned Single Judge of the Rajasthan High Court has held in **State Farms Corporation of India Ltd. vs. Rajendra Taneja**,⁸ that the word must be construed in a reasonable manner and signifies the existence of a proximate, intimate and real connection with the establishments or authorities mentioned in the definition and not a connection which is far fetched, remote and hypothetical. Therefore, in every case, it would be a question of fact to be determined on the facts whether an industrial dispute is one, concerning any of the corporations or authorities mentioned in the definition.

⁷ 2001 III CLR 873

⁸ 1984(48) FLR 25

14. Now, in so far as the evidence in the present case is concerned, it is an undisputed position that the workman was designated as a Docks Clerk in the establishment of the employer who was carrying on business of a clearing and forwarding agent in respect of goods in the Docks. The order of termination dated 27th June 1986 refers to the workman as a Dock Clerk and expressly refers to various acts of commission and omission on the part of the workman while discharging his duties as a dock worker. This includes withholding of wages, showing the engagement of extra labour, delayed payment of wharfage and effecting delivery, claiming excess delivery charges, misbehaviour with the Foreman of Stevedores, failure to register containers thereby incurring demurrage, neglect in tracing containers and failure to submit accounts relating to the grounding of containers. The items of omission and commission which are adverted to in the letter of termination clearly demonstrate that as a Dock Clerk, the work which was being done by the workman had a real proximate and intimate connection with a major port.

15. The Industrial Tribunal noted in the course of its Part-I award that the workman had deposed on affidavit about the

business activities of the employer which were being carried on in the Port of Mumbai and that the workman used to perform his duties in the port. The Tribunal noted that this statement made by the workman has gone unchallenged in the course of cross-examination and no oral evidence by way of rebuttal was led on behalf of the management. In fact, the case of the management itself in the written submissions was that the worker was required to visit the Docks on occasion for completing a particular job including the work of clearing and forwarding. The Union produced copies of settlements entered into with the employer in the presence of the Central Assistant Labour Commissioner. Having regard to the evidentiary material on record, the Learned Single Judge, in our view, was justified in confirming the conclusion that was arrived at by the Industrial Tribunal.

16. The judgment of the Division Bench in **Irkhar Shahu vs. Bombay Port Trust**, 1994 I CLR 1987, upon which reliance has been placed by the Appellant has no relevance to the issues in the present case. The judgment lays down that the Maharashtra Mathadi Hamal and other Manual Workers (Regulation of Employment and Welfare) Act, 1969 can also cover those workers

employed in the Docks in connection with loading and unloading so long as such workers are not covered by any of the schemes framed under the Dock Workers Act, 1948.

Validity of the order of termination :

17. The order of termination dated 27th June 1986 postulates that the management had lost confidence in the workman and that this services were being discharged simpliciter with effect from 1st July 1986. The termination of services is premised on major lapses/omissions and dereliction in duties of which details are contained in two parts of the order. The first part deals with acts of commission and omission between 1978 and 1983, while the second, deals with allegations between the period 1984 and 1986. The allegations which are contained in the letter of termination ex-facie involve serious acts of misconduct. As the letter itself sets out these charges include habitual and frequent absentism, misappropriation of the moneys belonging to the employer, misrepresentation of facts and false claims to overtime. The allegations in the letter of termination cover a whole gamut of misconduct including acts of cheating and defrauding, misbehaviour with other workmen and negligence in the discharge

of duties. The employer has failed to establish any reason or justification before the Industrial Tribunal and before the Learned Single Judge for dispensing with a disciplinary enquiry. Even before this Court, in appeal, it has not been the submission of the employer that there were valid or justifiable reasons for dispensing with the disciplinary enquiry or that the circumstances were such that it was impossible to hold an enquiry in which the charges of misconduct could be sustained on the basis of evidence adduced on the record.

18. In **Air India Corporation vs. V.A. Rebellow**,⁹ the Supreme Court dealt with Regulation 48 of the Air India Employees' Service Regulations under which the service of an employee could be terminated without assigning any reason subject to a notice of a stipulated period or pay in lieu thereof. That was a case where the Labour Court held that the dismissal was not a discharge simpliciter, but in breach of the provisions of Section 33 of the Industrial Disputes Act, 1947. The judgment of the Supreme Court recorded that before the Labour Court the employer filed an affidavit disclosing that the services of the

9 1972 I LLJ 501

complainant were terminated because of a total loss of confidence on account of grave suspicion regarding his general conduct and behaviour with Air-hostesses of the Corporation. The reports and statements of the Air-hostesses could not be disclosed as they involved the reputation and future of “young and unmarried girls”. In these circumstances the Supreme Court held that the termination of the services of the workman was for bona fide reasons having a bearing on the performance of his duties by the workman:

“The fact that the employer is not fully satisfied with the overall result of the performance of his duties by his employee does not necessarily imply misconduct on his part. The only thing that remains to be seen is if in this case the impugned order is mala fide. The record merely discloses that the appellant had suspicion about the complainant's suitability for the job in which he was employed and this led to loss of confidence in him with the result that his services were terminated under Regulation 48. In our view, loss of confidence in such circumstances cannot be considered to be mala fide. We are unable to conceive of any rational challenge to the bona fides of the employer in making the impugned order in the above background. The complainant, it may be remembered, had to deal with air-hostesses in the performance of his duties and if the appellant was not fully satisfied beyond suspicion about his general conduct and behaviour while dealing with them it cannot be said that loss of confidence was not bona fide. Once bona fide loss of confidence is affirmed the impugned order must be considered to be immune from challenge. The opinion formed by the employer about the suitability of his employee for the job assigned to him even though

erroneous, if bona fide, is in our opinion final and not subject to review by the industrial adjudicator. Such opinion may legitimately induce the employer to terminate the employee's services; but such termination can on no rational grounds be considered to be for misconduct and must, therefore, be held to be permissible and immune from challenge."

The same test was applied in an earlier judgment of two Learned Judges of the Supreme Court in **Tata Engineering and Locomotive Company Ltd. vs. Prasad**.¹⁰ The Supreme Court held that though the Standing Orders empowered the employer to terminate the services of an employee, merely giving a notice and wages in lieu thereof, the form of the order was not decisive. It would always be open to the Industrial Tribunal to decide whether the act of the employer is bona fide or was mala fide in colourable exercise of power:

"Under Standing Order 47, the company had the power to terminate Dubey's services on giving notice or wages in lieu thereof. No doubt, the fact that the order was couched in the language of a discharge simpliciter is not conclusive. Where such an order gives rise to an industrial dispute its form is not decisive and the tribunal which adjudicates that dispute can, of course, examine the substance of the matter and decide whether the termination is in fact discharge simpliciter or dismissal though the language of the order is one of simple termination of service. If it is satisfied that the order is punitive or mala fide or is made to victimize the workmen

10 1969 II LLJ 799

or amounts to unfair labour practice, it is competent to set it aside. The test is whether the act of the employer is bona fide. If it is not, and is a colourable exercise of the power under the contract of service or standing orders, the tribunal can discard it and in a proper case direct reinstatement.”

The same position was reiterated in a judgment of the Supreme Court in **L. Michael vs. Johnson Pumps India Ltd.**:¹¹

“An employer who believes or suspects that his employee, particularly one holding a position of confidence, has betrayed that confidence, can, if the conditions and terms of the employment permit, terminate his employment and discharge him without any stigma attaching to the discharge. But such belief or suspicion of the employer should not be a mere whim or fancy. It should be bona fide and reasonable. It must rest on some tangible basis and the power has to be exercised by the employer objectively, in good faith, which means honestly with due care and prudence. If the exercise of such power is challenged on the ground of being colourable or mala fide or an act of victimisation or unfair labour practice, the employer must disclose to the Court the grounds of his impugned action so that the same may be tested judicially.”

19. In **Chandu Lal vs. The Management of M/s. Pan American World Airways Inc.**,¹² the services of the Appellant were terminated on the allegation that there were reasonable grounds to infer that the Appellant was involved in an act of smuggling at

¹¹ 1975 I LLJ 262

¹² AIR 1985 SC 1128

Palam Airport. The Supreme Court held that the termination on the ground of lack of confidence involved a stigma, since a want of confidence in an employee signifies an adverse facet in his character. If no disciplinary enquiry was held, the termination would have to be regarded as invalid:

“It is difficult to agree with the finding of the Labour Court that when service is terminated on the basis of loss of confidence the order does not amount to one with stigma and does not warrant a proceeding contemplated by law preceding termination. Want of confidence in an employee does point out to an adverse facet in his character as the true meaning of the allegation is that the employee has failed to behave up to the expected standard of conduct which has given rise to a situation involving loss of confidence. In any view of the matter this amounts to a dereliction on the part of the workman and therefore, the stand taken by the management that termination for loss of confidence does not amount to a stigma has to be repelled. In our opinion, it is not necessary to support our conclusion by reference to precedents or textual opinion as a common sense assessment of the matter is sufficient to dispose of this aspect. 'Retrenchment' is defined in S.2(oo) of the Industrial Disputes Act and excludes termination of service by the employer as a punishment inflicted by way of disciplinary action. If the termination in the instant case is held to be grounded upon conduct attaching stigma to the appellant, disciplinary proceedings were necessary as a condition precedent to infliction of termination as a measure of punishment. Admittedly this has not been done. Therefore, the order of termination is vitiated in law and cannot be sustained.”

The Supreme Court, however, directed that an amount of Rs.2

lakhs be paid as and by way of back wages and in lieu of reinstatement.

20. In **Kamal Kishore Lakshman vs. The Management of M/s.Pan American World Airways Inc.**,¹³ the Supreme Court considered the case of a co-employee of Chandu Lal. As already noted above, the appeal filed by Chandu Lal was disposed of by granting compensation in lieu of reinstatement. The Appellant's Special Leave Petition was dismissed and after the judgment in **Chandu Lal'** case, a review was sought by the Appellant. The review was allowed and the Special Leave Petition was restored to file. The Supreme Court once again reiterated the view taken in **Chandu Lal'** case that a plea of loss of confidence “indeed casts a stigma.” The Court held that a loss of confidence by the employer in an employee affects the character or reputation of the employee and it has been correctly held in **Chandu Lal'** case that loss of confidence amounted to a stigma. In **Laxman's** case, the Supreme Court noted that though a domestic enquiry had not been held, the employer had substantiated the allegation in the course of adjudication before the Labour Court. In that context, the Court

¹³ 1987 I LLJ 107

held as follows :

“In the present case though no formal domestic inquiry had been held the employer took the stand in the adjudication that termination was grounded upon loss of confidence and substantiated that allegation by leading evidence. The legal position firmly established is that if there has been no appropriate domestic enquiry or no enquiry at all before disciplinary action is taken, it is open to the employer to ask for such opportunity in the course of adjudication. In the facts of the present case, the order of separation grounded upon loss of confidence has been justified before the Labour Court and the Labour Court has come to that conclusion upon assessment of the evidence.”

The Supreme Court further held as follows :

“If disciplinary inquiry has not preceded the prejudicial order in the case of a Government servant the action would be bad while in the case of a workman the order could be justified even in the course of adjudication before the appropriate Tribunal under the Industrial Disputes Act even though no inquiry had been undertaken earlier.”

21. In the present case, following the law laid down by the Supreme Court, we are of the view that the letter of termination ex-facie demonstrates that the termination of service was founded on allegations of misconduct against the workman. Indeed, the Written Statement by the employer before the Industrial Tribunal showed that the submission of the employer was that the workman was being terminated from service on grounds of misconduct. The

following extracts from paragraphs 3 and 5 of the Written Statement are extremely material for this purpose:

“The Employer submits that the workman was indulging in anti employer activities and was conducting himself in such manner as would cause loss, fraud, cheating and insubordination in the management and affairs of the company. The Employer submits that the workman was given ample opportunities for improving himself in his conduct but instead of improving himself in the discharge of his duties, the workman became more careless and negligent and continued his activities which have caused harm to the financial funds and reputation of the company. ... The employer has listed number of instances whether of misconduct, negligence or carelessness on the part of the workman in the discharge of his duties. The employer submits that due to this misconduct, carelessness and continued arrogant attitude of the workmen the employer lost confidence in him and came to the conclusion that it was not in the interest of the company to continue his services as the continuance of his services in the company would have adversely affected the reputation of the company and would have caused demoralisation effect on other workmen of the company.”

22. At this stage, it would be material to note that in para 6 of the Written Statement, the Appellant specifically pleaded that it was ready and willing to establish the allegations of misconduct, dereliction of duties, fraud, misappropriation and misuse of funds before the Tribunal. The Tribunal held that if the termination was an act of discharge simpliciter it constituted retrenchment within the

meaning of Section 2(oo) and was invalid for want of compliance with the requirement of Section 25F. Alternatively, if the termination was punitive, it was invalid on the ground that no disciplinary enquiry was held.

23. Now a case where no disciplinary enquiry has been held, stands on the same footing as one where the enquiry is held to be defective. As held by the Supreme Court in **Kamal Kishore Laxman's** case (supra), it would be open to the management to justify its conduct before the Industrial Tribunal in a case where a disciplinary enquiry has not preceded the act of termination. The employer having sought an opportunity of leading evidence to substantiate the charge of misconduct, such an opportunity ought to have been afforded to the employer by the Tribunal.

24. The judgment of the Learned Single Judge notes the submission of the employer that in view of the decision of the Supreme Court in **Kamal Kishore Laxman** (supra), the Tribunal should have given an opportunity to the management to lead evidence to prove the misconduct and there should be a remand for that purpose. We are, with respect, of the view that the

Learned Single Judge was in error in not accepting this plea of the employer and in declining to remand the proceedings back to the Tribunal. In the concluding part of the judgment, the Learned Single Judge held that the management had sought the permission of the Labour Court only to prove that it had acted bona fide and that it had not applied to the Labour Court to prove the charges. This, with great respect, would not be a correct reading of the request made by the employer in the Written Statement which shows that the employer was ready and willing to lead evidence to establish the charge of misconduct against the workman. There is, therefore, merit in the submission that has been urged on behalf of the management. The Learned Single Judge ought not to have reappreciated such evidence as there was on the record of the case, but ought to have remanded the proceedings back to the Industrial Tribunal. For one thing, there is no appreciation of the evidence in the Part II award of the Industrial Tribunal. Appreciation of evidence lies within the jurisdiction of the Tribunal. Moreover, the Industrial Tribunal failed to furnish an opportunity to the employer to specifically lead evidence to substantiate the charge of misconduct.

25. In these circumstances, we are of the view that the appeal would have to be allowed in part. We confirm the finding of the Learned Single Judge that the reference before the Tribunal was validly made by the Central Government since the Central Government is the appropriate Government within the meaning of section 2(a)(i) of the Industrial Disputes Act, 1947. We also hold that the termination of service in the present case was not an act of discharge simpliciter but was a punitive termination for misconduct. No disciplinary enquiry was held. The employer having made a request to that effect in the Written Statement, he would be entitled to an opportunity to lead evidence before the Industrial Tribunal to substantiate the charge of misconduct. To the aforesaid extent, we quash and set aside the Judgment and Order of the Learned Single Judge and the Part-II award of the Industrial Tribunal in so far as it awards reinstatement with back wages and continuity of service. We remand the proceedings back to the Industrial Tribunal which shall permit the employer to lead evidence to substantiate the alleged misconduct. The workman would, it is needless to add, be at liberty to adduce evidence in rebuttal. Having regard to the fact that the dispute in the present case has arisen as far back as in 1986, we direct that the

proceedings on remand shall be concluded by the Industrial Tribunal expeditiously and preferably within a period of six months from the date on which a certified copy of this order is produced on the record of the Tribunal by either of the parties. There shall be an order accordingly.

26. Before concluding, we must record that during the course of the hearing of these proceedings, Counsel appearing on behalf of the Employer and the workman made several efforts to resolve the dispute by persuading the parties to enter into a settlement. Counsel appearing on behalf of the workman has stated before the Court that the workman has not been willing to accept the offer of settlement that was made by the employer. In that view of the matter, the appeal was reserved for orders and we have proceeded to deliver judgment.

27. The appeal shall accordingly stand allowed to the extent indicated above. In the facts and circumstances of the case, there shall be no order as to costs.

(R.M.S. KHANDEPARKAR, J.)

(DR. D.Y. CHANDRACHUD, J.)